

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Church of the Eagle and the Condor, et al.,

Plaintiffs,

v.

Merrick Garland, et al.,

Defendants.

No. CV-22-01004-PHX-SRB

ORDER

The Court hereby orders pursuant to Rule 502(d) of the Federal Rules of Evidence, Rule 26(b) of the Federal Rules of Civil Procedure, and the Court's inherent authority, that the inadvertent production of information or documents (or part of a document), shall not constitute a waiver of any privilege or protection as to that information or any portion of that document, or as to any undisclosed privileged or protected communications or information concerning the same subject matter, in this action or in any other proceeding. This Order applies to attorney-client privilege, work-product protection as defined by Federal Rule of Civil Procedure 26(b), law enforcement privilege, any other governmental privileges, and any other applicable privilege. Nothing in this Order shall constitute an admission that any information or document disclosed in this litigation is subject to any of the foregoing privileges or protections, or that any party is entitled to raise or assert such privileges. The Party asserting any such privilege or protection bears the burden of establishing that it applies. Additionally, nothing in this Order shall prohibit parties from

1 withholding from production any document covered by any applicable privilege or other
2 protection.

3 The Parties intend that this stipulated order shall provide additional protections beyond
4 the provisions of Fed. R. Evid. 502(b)(1) and (2). That is, the disclosure of privileged or
5 protected information, as described above, in this action shall not constitute a subject matter
6 waiver of the privilege or protection in this or any other federal or state proceeding, regardless
7 of the standard of care or specific steps taken to prevent disclosure. However, nothing in this
8 Order shall limit a party's right to conduct a pre-production review of documents as it deems
9 appropriate.
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11 **I. DEFINITIONS**

12 1. "Party" shall mean any party to this action, including all of its officers, directors,
13 employees, consultants, retained experts, and outside counsel of record (and their support
14 staffs).
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16 2. "Non-Party" shall mean any natural person, partnership, corporation,
17 association, or other legal entity not named as a Party to this action.

18 3. "Designating Party" shall mean the person, Party, or Non-Party who designates
19 information or documents as "Protected Information."

20 4. "Producing Party" shall mean the person, Party, or Non-Party producing
21 discovery in this action.

22 5. "Receiving Party" shall mean any party who receives or is shown discovery in
23 this action.

24 6. "Document" shall mean all items listed in Fed. R. Civ. P. 34(a)(1)(A) and (B).

25 **II. PROCEDURES**

26 The procedures applicable to a claim of privilege on a produced document and the
27 resolution thereof shall be as follows:
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1 1. The Producing Party retains the burden of establishing the privileged or
2 protected nature of any produced information or document for which a privilege or protection
3 is asserted. Nothing in this Order is intended to shift the burden to identify privileged and
4 protected documents from the Producing Party to the Receiving Party.

5 2. If a Party or Non-Party discovers that it has received a document, or part
6 thereof, produced by another party that is privileged or otherwise protected, the Receiving
7 Party shall promptly notify the Producing Party and must then promptly return the document
8 or destroy it (to the extent reasonably technically feasible, if the document is stored on a
9 computerized system or is incorporated into another document) and certify that it has been
10 destroyed to the Producing Party. The Receiving Party must also promptly identify, sequester,
11 and destroy any notes, summaries, or other written materials about the document (to the
12 extent reasonably technically feasible, if the document is stored on a computerized system or
13 is incorporated into another document).

14 3. If the Producing Party determines that a document produced, or part thereof,
15 is subject to privilege(s) or other protections, the Producing Party shall give the Receiving
16 Party notice of the claim of privilege or protection ("Privilege Notice").

17 4. The Privilege Notice must contain information sufficient to identify the
18 document, including, if applicable, a Bates number, as well as identification of the privilege
19 asserted and its basis.

20 5. Upon receiving the Privilege Notice, if the Receiving Party accepts the privilege
21 assertion made, the Receiving Party must promptly follow the procedures set forth in
22 Paragraph II.2 above applicable to a Receiving Party's own discovery of a document's
23 privileged or otherwise protected nature. Such acceptance shall not operate as an admission
24 that the claimed privilege or protection applies, nor shall it prejudice in any way a Party's ability
25 to challenge a claim of privilege or protection in the future. If a Receiving Party disclosed the
26 document or information specified in the Privilege Notice before receiving the notice, it must
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1 take reasonable steps to retrieve it, and so notify the Producing Party of the disclosure and its
2 efforts to retrieve the document or information.

3 6. Within fourteen (14) calendar days of notification that the Receiving Party
4 returned, destroyed, sequestered, or deleted the specified document(s), copies, and notes, the
5 Producing Party shall produce a privilege log with respect to the specified documents.

6 7. Upon receiving the Privilege Notice, if the Receiving Party wishes to dispute a
7 Producing Party's Privilege Notice, the Receiving Party shall promptly meet and confer with
8 the Producing Party. The document(s) shall be sequestered immediately upon receiving the
9 Privilege Notice and not be used by the Receiving Party in the litigation while the dispute is
10 pending. If the Privilege Notice concerns a document that a Receiving Party intends to use in
11 a filing, and the Notice is received within five business days of the filing's deadline, the Parties
12 agree that (a) the Party adverse in this action to the Receiving Party will consent to a motion
13 to extend the filing's deadline by up to seven business days, so that the Receiving Party can
14 revise the filing to remain in compliance with this Agreement and Order, and (b) good cause
15 will exist to support granting a such motion by the Receiving Party. Nothing in this Order
16 shall limit a Receiving Party's right to move to extend a filing deadline if a Privilege Notice is
17 received more than five business days before the deadline.

18 8. If the Parties are unable to come to an agreement about the privilege assertions
19 made in the Privilege Notice, the Receiving Party may make a sealed motion for a judicial
20 determination of the privilege claim. However, no written discovery motion may be filed
21 without a prior conference with the Court and leave of the Court, pursuant to the Court's
22 Case Management Order, ECF No. 34, at 3. Nothing in this Order shall limit the right of any
23 Party to request an *in camera* review of inadvertently disclosed information.


24 9. Pending resolution of the judicial determination, each Party shall preserve and
25 refrain from using the challenged information for any purpose and shall not disclose it to any
26 person other than those required by law to be served with a copy of the sealed motion. The
27 Receiving Party's motion challenging the assertion must not publicly disclose the information
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1 claimed to be privileged. Any further briefing by any Party shall also not publicly disclose the
2 information claimed to be privileged if the privilege claim remains unresolved or is resolved
3 in the Producing Party's favor.

4 10. If a document must be returned or destroyed as determined by the process
5 above, that document, along with copies and notes about the document, that exist on back-
6 up tapes, information technology ("IT") systems, or similar storage need not be immediately
7 deleted or destroyed, if such materials will be overwritten and destroyed in the normal course
8 of business. Until they are overwritten in the normal course of business, the Receiving Party
9 will take reasonable steps to limit access, if any, to the persons necessary to conduct routine
10 IT and cybersecurity functions.

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12 Dated this 11th day of July, 2023.

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Susan R. Bolton
United States District Judge